SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CARLOS MEDINA,

Plaintiff,

-against-

BIRO MANUFACTURING COMPANY, BI-COUNTY SCALE & EQUIPMENT CO. LLC and 601 OLD COUNTRY ROAD CORPORATION d/b/a JOHN'S FARMS,

Defendants.

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BIRO MANUFACTURING COMPANY,

Third-Party Plaintiff,

-against-

601 OLD COUNTRY ROAD CORPORATION d/b/a JOHN'S FARMS,

Third-Party Defendant.

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Index No.: 158120/12

Motion Seq. No.: 004

DECISION & ORDER

Third-Party Index No.: 590292/13

HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Biro Manufacturing Company ("Biro") moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint of plaintiff Carlos Medina ("plaintiff" or "Medina"), and all cross-claims of co-defendants. Defendant Bi-County Scale & Equipment Co. LLC ("Bi-County") cross-moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint of Medina. Defendant 601 Old Country Road Corporation d/b/a John's Farms ("John's Farms") cross-moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint of Medina and all cross-claims asserted against it, as well as the third-party complaint

of Biro[1]. Plaintiff Medina cross-moves to amend his pleadings pursuant to CPLR § 3025 to add a cause of action for negligence against Bi-County and John's Farms.

BACKGROUND

This matter involves injuries sustained by plaintiff Carlos Medina on July 27, 2012 while he was operating a bandsaw manufactured by Biro (the Biro model #3334 [the "Biro Saw" or "subject saw"]). Medina was a "meat cutter" in the meat department at a supermarket, known as John's Farms, in Plainview, New York and an employee of non-party Business Network Connection ("BNC"). Plaintiff alleges that he was using the Biro Saw to cut a two foot long porterhouse.[2] As he pushed the meat from right to left with his left hand, the saw began vibrating and his left hand was cut by the saw blade which "fell off" or "came off" (Notice of Motion, Exhibit "S" [Medina deposition] at 53, 65, 69-71, 76). Specifically, plaintiff testified

> "Q. At the time of your accident, can you tell me what happened?
> A. Explain what happened, the blade, the machine, I was cutting meat when the machine with the vibrations it had, the blade came loose, it fell off, because the bearing was no good.
> The plastic on the bottom that holds the blade, that guides it, was ripped like this (indicating). The blade fell off and cut me" (Notice of Motion, Exhibit "Q" [Media deposition] at 53).

Plaintiff alleges that as a result, he suffered severe injuries to his left hand. He affirms that he had complained about the vibration of the saw "all the time" while he was working at John's Farms, but the condition remained uncorrected (Notice of Motion, Exhibit "Q" [Medina deposition] at 94-95). His complaints were allegedly made to Rafael Gonzalez ("Gonzalez"),

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[1]As against John's Farms, this action was initially commenced under the third-party summons and complaint brought by Biro filed on or about April 8, 2013. After issue was joined in the third-party action, Medina amended the original complaint to add John's Farms as a direct defendant on June 17, 2013. The motions by Biro and John's Farms for summary judgment were filed on or about November 19, 2014 and November 21, 2014, respectively. Therefore, although Biro and John's Farms seek summary judgment dismissing Medina's Complaint, the Court deems such motions as applications seeking to dismiss Medina's Amended Complaint. Bi-County's Notice of Cross-Motion seeks dismissal of plaintiff's Amended Complaint.

[2]Plaintiff testified that before the accident, he had already cut three pieces from the subject porterhouse (Notice of Motion, Exhibit "Q" [Medina deposition] at 109-111).

who Medina claimed was in charge of the meat department[3], and to Gonzalez's boss, a "lady" named "Millie"(Notice of Motion, Exhibit "Q" [Medina deposition at 96).[4]

Richard Waterbury, a service technician for Bi-County, testified at his deposition that Bi-County reportedly serviced the subject Biro Saw on an as-needed basis ("We'll come when you call") (Bi-County's Notice of Cross-Motion, Exhibit "L" [Waterbury deposition] at 7, 127). Bi-County maintains that the last time it serviced the Biro Saw was on March 29, 2012, four months before the accident (Bi-County's Notice of Cross-Motion, Exhibit "L" [Waterbury deposition] at 61; Bi-County's invoice [Bi-County's Notice of Cross-Motion, Exhibit "O"]). Based on testimony by non-party Diane Clancy ("Clancy"), meat department manager employed by BNC, plaintiff alleges that Bi-County serviced the Biro Saw three days before the accident. In addition, according to plaintiff, the machine was normally and regularly serviced by John's Farms' meat department employees, including himself, and the blades were changed every day, and whenever they broke (Notice of Motion, Exhibit "S" [Medina deposition] at 91-93, 120-121).

Medina also testified that prior to his accident, the Biro Saw had problems with the pusher, blade, guard, bearings, legs, plastic that holds the blade, the saw guide, and excessive vibration (*Id.* at 39-40, 52-53, 57, 58, 60, 65, 71, 73, 75-76, 105-106, 122). Plaintiff's Amended Verified Complaint (the "Amended Complaint") alleges causes of action against all defendants for strict product liability ("First Cause of Action") and breach of warranty ("Second Cause of Action"). Plaintiff now seeks to amend his Amended Complaint and include a cause of action for negligence as against Bi-County and John's Farms.[5]

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[3]Gonzalez was allegedly employed by BNC (Notice of Motion, Exhibit "Q" [Medina deposition] at 155-156).
[4]Plaintiff testified that he never made a complaint to Joe Catalano ("Catalano") who was employed by John's Farms (Notice of Motion, Exhibit "Q" [Medina deposition] at 96; Notice of John's Farm's Cross-Motion, Exhibit "E" [Catalano deposition] at 5-7).
[5]Although the proposed "third cause of action" alleges negligence against all defendants, plaintiff clarified during oral argument that he is not seeking to amend his Amended Complaint to add a claim for negligence as against

ARGUMENTS

Relying on the Affidavit of its expert, Kenneth S. Marshall ("Marshall")[6], a mechanical engineer, sworn to on November 18, 2014, Biro argues that Medina's injuries were not caused by a defect in the subject saw (Biro Notice of Motion, Exhibit "S"). Based upon his inspection of the subject saw, Marshall opines that it was in "fair physical condition", but "was free of any design/manufacturing defect or deficiency that would have resulted in [plaintiff's] injury." Rather, "[plainitff's] injuries arose as a consequence of the manner in which the saw was used, operated and maintained" and that plaintiff's "injury arose from conditions unrelated to the design or manufacturing of the subject saw." Marshall also opined that there were "adequate and sufficient warnings that emphasized known dangerous conditions" (Biro's Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶¶ 12-14).[7] Biro argues that according to the deposition testimony of Medina, the Biro Saw was not receiving adequate and proper maintenance.

Biro maintains that plaintiff's claims for strict liability based on design defects must therefore fail. Rather, Biro argues that plaintiff's injuries were caused by plaintiff's failure to properly cut the meat and to utilize the provided safeguards (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 14). Biro also contends that a valid limited warranty provided with the Biro Saw had expired at the time of the incident, and therefore Medina's breach of warranty claims are not viable.

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defendant Biro (Tr. of Oral Argument at 21-22).

[6]Marshall examined the subject saw on July 24, 2013, which is approximately one year after plaintiff's accident. The Court will consider Marshall's affidavit even though he presents no evidence that the Biro Saw was in the same condition when he examined it as it was on the day of the subject accident (*see Budd v Gotham House Owners Corp.*, 17 AD3d 122, 123 [1st Dept 2005]).

[7]The Marshall Affidavit is sworn to by an Ohio notary and Biro has failed to submit a certificate of conformity (CPLR § 2309(c)). However, in opposition, plaintiff failed to raise this issue. In any event, "the absence of a [certificate of conformity] is a mere irregularity, and not a fatal defect" (*Matapos Tech. Ltd. v Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

Bi-County argues that it did not manufacture, design, or sell the Biro Saw, so any claims sounding in strict products liability or breach of warranty must be dismissed against it. In addition, Bi-County maintains that plaintiff's claims of negligence against it cannot stand, as Bi-County owed no duty to plaintiff as a third party, and that none of the exceptions espoused in *Espinal v Melville Snow Contrs*. (98 NY2d 136 [2002]) apply. Finally, Bi-County argues that, in any event, Medina's misuse of the Biro Saw constituted the sole proximate cause of his injury.

John's Farms contends that on the date of the accident (i) plaintiff was an employee of BNC which operated the meat department within John's Farms; (ii) BNC employees did not train or supervise plaintiff; (iii) BNC owned the subject band saw; (iv) BNC paid for all maintenance and repairs of the saw; and (v) there were no common employees between John's Farms and BNC. As such, John's Farms argues that Medina cannot establish that it owed him a duty of care under the product liability, negligence, or breach of warranty claims alleged. In any event, Bi-County contends that plaintiff cannot establish strict products liability or breach of warranty causes of action as Bi-County is not in the chain of distribution of the Biro Saw.

In opposition to Biro's motion and John's Farms and Bi-County's cross-motions for summary judgment, Medina proffers an Affidavit of William Marletta, PhD ("Marletta"), a Certified Safety Professional, sworn to on March 3, 2015 (Plaintiff's Cross-Motion, Exhibit "B").[8] Marletta opines, among other things, that (i) the subject saw was inadequately designed as it failed to guard against users contacting the blade with their left hand; (ii) the Biro Saw was "ill-equipped" to accommodate cutting large pieces of meat and there were no warnings to that effect; (iii) the blade guides were inadequately designed and constructed; (iv) the Biro Saw was inadequately guarded; (v) the warnings provided were inadequate; and (vi) adequate safety

[8]Marletta conducted an inspection of the Biro Saw on July 24, 2013 (Plaintiff's Notice of Cross-Motion, Exhibit B [Marletta Affidavit] at ¶ 5, p.3).

controls, including "dead man controls"[9] or a design allowing the saw to turn off automatically if the blade becomes wobbly, misses tracks or detaches could have prevented the accident. At the same time, Marletta concedes that the blade guides were inadequately maintained and were "subject to wear and tear", that it is foreseeable that the blade[10] dislodges frequently during normal use and that "there was excessive movement of the blade and [a] failure to properly maintain and service the machine and align [*sic*] blade..." (Plaintiff's Notice of Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶ 10).

With respect to John's Farms, plaintiff also argues there are issues of fact as to the duty of care owed by John's Farms to plaintiff on grounds that the record reveals issues of the control, supervision and co-mingling of duties as between non-party BNC and John's Farms. In opposition to Bi-County's cross-motion for summary judgment, plaintiff argues there is an issue of fact as to whether Bi-County owed a duty of care to plaintiff especially in view of the failure of Bi-County to produce a servicing contract, and in any event, Bi-County failed to exercise reasonable care in servicing the Biro Saw.[11]

DISCUSSION

Cross-Motion by plaintiff for Leave to Amend the Amended Complaint

Medina seeks to amend the Amended Complaint to include allegations of negligence against Bi-County and John's Farms. It is undisputed that plaintiff's motion to amend the Amended Complaint was filed several months after the note of issue was filed, and only in opposition to Biro's motion and the cross-motions by Bi-County and John's Farms for summary judgment. Nonetheless, courts have a strong public policy favoring resolution of disputes on the

[9]According to Marletta, "dead men controls" "detect the presence of the human hand in the region of hazard and stop the machine automatically" (Plaintiff's Notice of Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶ 16).
[10]Marletta uses the term "band" but from his previous sentence it is evident that he meant "blade" (Notice of Plaintiff's Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶ 15)
[11]Plaintiff refers to certain of Waterbury's deposition testimony wherein Waterbury stated he would, at times, not perform certain repairs to keep the cost down for John's Farms (Plaintiff's Notice of Cross-Motion at ¶ 34).

merits (*Ayala v Delgado*, 278 AD2d 59, 59 [1st Dept 2000]). "[L]eave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. Mere delay is insufficient to defeat a motion for leave to amend" [internal citations omitted] (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; *see generally Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]).

Here, this Court is satisfied that Bi-County and John's Farms are neither surprised nor prejudiced by the potential amendment. Their motions for summary judgment already address the issue of negligence directly, and the amendment relies on evidence, including deposition testimony in the record (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). The motion for leave to amend was supported by an affidavit of merits and evidentiary proof (*see Non–Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]). However, as to John's Farms, the Court has made a determination that plaintiff's negligence claim against John's Farms is lacking in merit. As such, the motion for leave to amend the Amended Complaint to assert a cause of action for negligence is granted as to Bi-County only (*see Posner v Central Synagogue*, 202 AD2d 284, 284 [1st Dept 1994]["leave to amend should not be granted, where...the proposed amendment is plainly lacking in merit"]).

Summary Judgment Generally

A motion for summary judgment may be granted only where there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Thus, the burden is on Biro, Bi-County, and John's Farms to each make prima facie showings of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). Failure of these parties to make such showings requires denial of the summary judgment motions, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). Only after

these showings are made does the burden shift to plaintiff to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). In this regard, although papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to plaintiff (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a properly supported motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d at 562).

Biro's Motion for Summary Judgment

Under New York law, it is well settled that a manufacturer may be held liable for placing a defective product, which causes injury, into the stream of commerce. "A product may be defective when it contains a manufacturing flaw, is defectively designed, or is not accompanied by adequate warnings for the use of the product" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]; *see Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). In order for there to be recovery for damages caused by the Biro Saw, Medina must show that the alleged product defect was "a substantial factor in bringing about the injury or damage and additionally, among other things, at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 532 [1991] [internal citation omitted]). "While [a] manufacturer is under a nondelegable duty to design and produce a product that is not defective, that responsibility is gauged as of the time the product leaves the manufacturer's hands" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980]).

New York also recognizes the viability of a circumstantial approach in products liability cases. *See Codling v Paglia*, 32 NY2d 330, 337 (1973) ("plaintiff is not required to prove the specific defect, especially where the product is complicated in nature[, but p]roof of necessary

facts may be circumstantial"). As such, there may be recovery for injury without proof of a specific defect, where it may be inferred that a product defect existed at the time of sale or distribution when the incident that injured the plaintiff "(a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41-42 [2003], quoting Restatement [Third] of Torts: Products Liability § 3 [1998]).

Regarding plaintiff's claims for strict products liability based on failure to warn, "a manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d at 237 [internal citation omitted]). However, "where the injured party was fully aware of the hazard through general knowledge, observation or common sense...lack of a warning about that danger may well obviate the failure to warn as a legal cause of any injury resulting from that danger"(*Id.* at 241).

Urena v The Biro Manufacturing Co., 114F3d 359 [2d Cir 1997] is particularly instructive. There, an operator of a band saw manufactured by Biro, failed to use the "end cut pusher plate" or safety plate and injured his left hand while cutting a pig's foot. The Second Circuit found an issue of fact as to whether the alleged design defect, "(i.e. the removability of the safety plate) was a substantial cause of plaintiff's injuries" (*Id.* at 363). Significantly, the Second Circuit noted that Biro's arguments that the plaintiff's injuries were caused by the poor condition of the saw, rather than the absence of a safety plate, presented a material issue of causation. The Second Circuit stated that "[a] reasonable jury could conclude either that the lack of a safety plate was, or was not, the cause of the injury because the plate would have, or would not have, protected [plaintiff's] hands against the dangers caused by the unexpected stopping and

restarting of the motor" (*Id.* at 364). In addition, the Second Circuit found that the adequacy of the warnings is "generally a question of fact to be determined at trial and is not ordinarily susceptible to the drastic remedy of summary judgment." Finding issues of fact as to causation, whether or not the saw was unreasonably dangerous and the adequacy of the warnings, the Second Circuit denied defendant's motion for summary judgment on plaintiff's strict products liability cause of action.

Here, there is likewise an issue of fact as to the proximate cause of plaintiff's accident. Plaintiff's Amended Complaint appears to allege strict liability based on design defect and failure to warn. With respect to claims of a design defect, Biro's expert Marshall opined that plaintiff's "report of frequent vibration is indicative of a bearing problem, which would result in an inability of the blade to track properly and can lead to its detachment as reported. This condition could not be the result of a design defect but would instead result from lack of maintenance" (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 12). In fact, plaintiff does not dispute that the Biro Saw was not well maintained.

However, Marshall also stated "if the product being cut was narrow enough that holding it brought hands/fingers close to the blade, then the end cut pusher should have been used to create a safety barrier between the blade and the hands/fingers" (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 14). Marshall explained that the "end cut pusher" is provided with the subject saw to assist an operator when cutting smaller pieces of meat. According to Marshall, "the pusher allows the operator's hand to be positioned away from the area of the blade while cutting small pieces of meat, providing a safety benefit normally provided by virtue of the size of the meat and allows the meat to be cut without exposure of the operator's hands to the cutting elements" (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 8). Waterbury also testified as to the safety role of the end cut pusher. Waterbury stated that "if [Medina] cut his left hand,

anywhere on his left hand [*sic*] he did not use the meat cut pusher like he was supposed to...if he used the meat cut pusher he would have never got cut" (Notice of Motion, Exhibit "T" [Waterbury deposition] at 100-101).

Based on such evidence, there is an issue of fact as to whether the subject saw was defectively designed as a result of the failure of the pusher plate to protect against injury in cases where large pieces of meat are being cut. In fact, Richard Biro testified that the pusher plate cannot be used for pieces of meat having lengths of longer than approximately ten inches (Notice of Motion, Exhibit "L" [Biro deposition] at 72, 74). It is undisputed that Medina did not use the end cut pusher at the time of the subject accident and that the porterhouse he was cutting was approximately two feet long and "a hand and a half" high off the table (Notice of Motion, Exhibit "Q" [Medina deposition] at 65-68).

The evidence also raises an issue of fact as to whether inadequate maintenance was the proximate cause of the accident. Marshall opined that the bearing problem which can lead to detachment of the blade was caused by inadequate maintenance. Marshall also opined that the accident arose as a consequence of plaintiff's own actions in failing to seek remedial maintenance after finding that the machine was shaking (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 14). While Marletta admits that there was a failure to properly maintain and service the subject saw, he opined that a proximate cause of the accident was its inadequate design[12] (Plaintiff's Notice of Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶¶ 10, 15). Specifically, Marletta states that the Biro Saw was "ill-equipped to accommodate larger pieces of meat" (Plaintiff's Notice of Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶ 10).

[12]Marletta states that defendants "failed to provide a reasonably safe band saw which resulted in the accident and injuries to plaintiff (Plaintiff's Notice of Cross-Motion, Exhibit "B" [Marletta Affidavit] at ¶ 8).

Regarding the sufficiency of the warnings, Marshall stated in his deposition that two warning labels were located adjacent to the power switch, one in English and the other in Spanish (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 12). A copy of the label, provided as Exhibit "M" to Biro's motion, provides, among other things, "DO NOT Use Saw if it is Altered, Damaged, Improperly Maintained, or if Warning [*sic*] Are Illegible or Missing." Richard Biro, President of Biro, testified at his deposition that Biro also provides a warning poster with the purchase of the Biro Saw (Notice of Motion, Exhibit "L" [Richard Biro deposition] at 28-30; Notice of Motion, Exhibit "N" [copy of poster]).[13]

Biro has likewise failed to meet its burden regarding the sufficiency of the warnings accompanying the Biro Saw. A manufacturer has a "duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] [citations omitted]). Thus, if it was foreseeable that large pieces of meat would be cut without the use of the pusher plate, Biro may be liable for failing to warn of such risks.[14]

As such, Biro's motion for summary judgment dismissing plaintiff's first cause of action for strict products liability cause of action is denied.

Bi-County's Cross-Motion for Summary Judgment

Bi-County moves for summary judgment on three grounds. First, it argues that Medina has only set forth only claims sounding in strict products liability and breach of warranty, and, as Bi-County did not manufacture, design or sell the Biro Saw, the Amended Complaint must be

[13]Marshall stated in his Affidavit, however, that upon inspection of the subject Biro Saw, he found that "some warnings and instruction labels were in place and legible, while others shown in the Biro manual were worn or missing" (Notice of Motion, Exhibit "S" [Marshall Affidavit] at ¶ 12).

[14]Biro's motion for summary judgment to the extent it seeks to dismiss Medina's breach of warranty cause of action [Second Cause of Action] is granted. Plaintiff has failed to oppose Biro's claims that the limited warranty provided with the subject saw expired at the time of the accident.

dismissed as against it.[15] Second, Bi-County maintains that any claim of negligence, if made, would have to be dismissed under the *Espinal* Rule (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-140 [2002]), which establishes that there are only limited conditions under which contractual liability may give rise to tort liability to third persons.[16] Finally, Bi-County maintains that the sole proximate cause of Medina's injury was his own misuse of the Biro Saw in failing utilize the saw guard or pusher plate for the machine.[17]

"A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Id.* at 138 [2002] [internal citation omitted]). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care–and thus be potentially liable in tort–to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Id* at 140 [internal quotes and citations omitted]). *See Church v. Callanan Indus.*, 99 NY2d 104, 110-113 [2002]; *Fernandez v. Otis El. Co.*, 4 AD3d 69, 72-73 [1st Dept. 2004]; *accord Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 (2007). Thus, Bi-County argues that it could not have launched the instrument of harm, there could be no reliance on any contractual obligations, and there was no displacement of any duty to maintain the saw.

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[15]Plaintiff's attorney acknowledged in oral argument that the claim against Bi-County for strict products liability is not viable (Tr. Oral Argument at 24-25).

[16]Although the parties fail to proffer a written agreement or contract between Bi-County and John's Farms (and or BNC), there was an admittedly an agreement whereby Bi-County became obligated to service the Biro Saw.

[17]Bi-County's motion for summary judgment to the extent it seeks to dismiss Medina's breach of warranty claims is granted. Plaintiff fails to oppose Bi-County's contention that the breach of warranty claim as asserted against Bi-County cannot lie as Bi-County did not manufacture, design or sell the subject saw, or was not otherwise in the distribution chain.

This Court turns first to the third exception. In order to impose tort liability upon a service provider arising out of a contractual obligation for injuries sustained by a non-contracting third party, there must be sufficient evidence that the contract was "comprehensive and exclusive" (*Church v. Callanan Indus.*, 99 NY2d at 113; *see Palka v. Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]). Courts have refused to impose such liability where there is evidence of a "limited scope" of a non-contracting party's undertaking (*id; See Timmins v. Tishman Constr. Corp.*, 9 AD3d 62, 68 [1st Dept 2004]; *see e.g. Church v. Callanan Indus.*, *supra* at 113 [construction company did not comprehensively contract to assume all safety-related obligations with respect to the guiderail system alleged to be defective]; *Hernandez v. Pace El. Inc.*, 69 AD3d 493, 495 [1st Dept. 2010] [elevator company's contract with a NYC agency was not so comprehensive and exclusive as to displace the city's obligations to maintain the subject elevators in a safe condition]; *Jackson v. Board of Educ. of City of N.Y.*, 30 AD3d 57, 63, 65-66 [1st Dept 2006] [building maintenance company's contract did not cover area where plaintiff fell, and was not exclusive; such company did not assume a blanket responsibility for the entire location]; *Timmins v. Tishman Constr. Corp.*, 9 AD3d at 68 [contract did not impose any obligation of a comprehensive and exclusive duty of maintenance and inspection; no showing that contractor on the site for more than two days during the weeks prior to the accident when isolated work was performed]; *Fernandez v. Otis El. Co.*, 4 AD3d at 73 [limited service agreement did not cover replacement of the part alleged to have malfunctioned; "contract was not a comprehensive assumption of all of the college's safety-related obligations with respect to the elevator from which this plaintiff fell" *citing Salas v. Otis El. Co.*, 234 AD3d 356 [2d Dept. 1996]; *Lorenz v. 575 Fifth Ave. Assoc.*, 187 AD2d 274 [1st Dept. 1992]).

In a few cases, courts have imposed such liability under the following circumstances: *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 NY2d at 588 [wall mounted fan in hospital fell on

nurse; contract was comprehensive and exclusive requiring maintenance contractor "to train, manage, supervise and direct all support services employed in the performance of daily maintenance duties"]; *Ezzard v. One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 165 [1st Dept. 2015] [plaintiff fell while exiting misleveled elevator; full service contract required elevator company to provide services at a minimum of one hour per week but only addressed the limited issue of "control" and not whether the contract was "comprehensive and exclusive"]; *Sarisohn v. Plaza Realty Servs, Inc.*, 109 AD3d 654, 655 [2d Dept. 2013] [contractor's oral agreement with the property owner constituted a comprehensive and exclusive agreement to clear the parking lot and walkways of snow and ice thereby displacing the property owner's duty]; *Cowsert v. Macy's E., Inc.*, 79 AD3d 1319, 1320 [3d Dept. 2010] [elevator company's contract included, among other things, "duties to maintain the escalators in a safe operating condition, perform routine maintenance, replace worn parts, and provide emergency service."

Here, Richard Waterbury, Bi-County's service technician, attested that Bi-County would service the machines at the John's Farms supermarket, including the subject Biro Saw, only on an "as needed" basis (Notice of Bi-County's Cross-Motion, Exhibit "L" [Waterbury deposition] at 12-15]. Indeed, Bi-County claims, based on its records and testimony, that the last time it serviced the machine was some four months before the accident.[18] There is no evidence in the record demonstrating that Bi-County was required to continuously inspect and monitor the subject saw. As such, an agreement, if any, between Bi-County and John's Farms or BNC is not a "comprehensive and exclusive" contract which would displace John's Farms' obligation or BNC's obligation to maintain the Biro Saw in a safe condition (*See Espinal v Melville Snow Contrs.*, 98 NY2d at 140; *Jackson v. Board of Educ. of City of N.Y.*, 30 AD3d at 66).

[18] In contrast, Diane Clancy, an employee of BNC, who was allegedly tasked with getting service from Bi-County for the Biro Saw, states that Bi-County serviced the subject machine three days before the accident. However, additional testimony by Clancy reveals that she could not recall if Bi-County actually made such a service call (Plaintiff's Notice of Motion, Exhibit "C" [Clancy deposition] at 18-19, 151).

Regarding the second Espinal exception, there is no evidence in the record that Medina detrimentally relied on the continued performance of Bi-County's duties. Finally, this Court turns to the first Espinal exception, *to wit*, whether Bi-County owed Medina a duty of care by virtue of "launching a force or instrument of harm" in failing to exercise reasonable care in servicing the subject Biro saw. This exception applies where a defendant negligently creates or exacerbates a dangerous condition (*see Espinal v. Melville Snow Contrs.*, 98 NY2d at 141-142; *Jenkins v Related Cos., L.P.*, 114 AD3d 435, 436 [1st Dept 2014]; *Grant v Caprice Mgt. Corp.*, 43 AD3d 708, 709 [1st Dept 2007]).

In this case, the record presents triable issues of fact as to whether Bi-County launched a force or instrument of harm in failing to exercise reasonable care in its servicing of the Biro Saw (*see e.g. Jenkins v Related Cos., L.P.*, 114 AD3d at 436 citing *Espinal*, 98 NY2d at 141 (internal quotation marks omitted); *Kramer v Cury*, 92 AD3d 484 [1st Dept 2012]; *Bienaime v Reyer*, 41 AD3d 400, 403 [2d Dept 2007]). Indeed, although plaintiff testified that the blades were changed everyday by a meat department employee (Notice of Motion, Exhibit "Q" [Media deposition] at 91)[19], exactly when Bi-County last serviced the Biro Saw, and whether the service "launched an instrument of harm," are factual matters that the court should not determine upon summary judgment (*See e.g. Jackson v Whitson's Food Corp.*, 130 AD3d 461, 462 [1st Dept 2015]; *Jenkins v Related Cos., L.P.*, 114 AD3d at 436). Accordingly, the motion of Bi-County for summary judgment dismissing the Amended Complaint is denied to the extent the Amended Complaint asserts a cause of action for negligence.

John's Farm's Cross-Motion for Summary Judgment

[19]Plaintiff also testified that he changed the blade himself when it broke which occurred approximately two to three times in the six years he worked in the meat department (Notice of Motion, Exhibit "Q" [Medina deposition] at 93).

Plaintiff's attorney acknowledged at oral argument that the claim against John's Farms for strict liability is not viable (Tr. Oral Argument at 24-25), and there is no basis to hold John's Farms liable for breach of warranty. This leaves only plaintiff's claim for negligence as the remaining cause of action against John's Farms.

In support of its cross-motion, John's Farms argues that it owed no duty of care to plaintiff and that at the time of the subject accident (i) plaintiff was employed by BNC which operated the butcher shop within John's Farms and paid rent to John's Farms; (ii) the subject saw was owned by BNC, and BNC paid for its maintenance; (iii) plaintiff was trained by co-employees of BNC; and (iv) there were no common employees between John's Farms and BNC

Medina claims that liability for negligence may attach to John's Farms arguing, among other things that: (i) Medina was hired by Catalano of John's Farms[20]; (ii) although Medina worked for BNC, it was physically situated within the four corners of John's Farms; (iii) at some time in the past, prior to January or February 2012, Catalano had some involvement with BNC; (iv) customers who bought meat would use John's Farms registers and the bills were made out to John's Farms; and (v) John's Farms workers performed some maintenance, such as sweeping the floor, in the meat area of the supermarket (Notice of Plaintiff's Cross-Motion at ¶¶ 29-31). Medina also alleges that the evidence shows that Catalano "may even have been the one to have called Bi-County to perform service on this specific band saw in question just before the accident occurred" (Notice of Plaintiff's Cross-Motion, ¶ 31). However, Catalano actually testified that he had no specific recollection of calling for service on the subject saw, and in any event, would not have called for service in 2012 (Notice of Motion, Exhibit "K" [Catalano deposition] at 82-84).

[20]John's Farms argues that although Medina's testified that Catalano's brother, Gregory Catalano, suggested that Media "stop by John's Farms" to inquire about a position and that Catalano conducted an interview with Medina, there is no testimony as to who hired plaintiff (Notice of Motion, Exhibit ""Q" at 139-140; Reply Affirmation and Affirmation in Opposition of John's Farms at ¶ 11).

Plaintiff's assertions are insufficient to defeat John's Farms' motion for summary judgment. Medina offers no theory upon which liability can be based. The mere location of BNC in the premises of John's Farms, an alleged past congruence of function, and cooperation in billing and bookkeeping does not amount to operational supervision of the Biro Saw, and creates no implications under the *Espinal* Rule. Moreover, the assertion that John's Farms *could have* controlled and supervised Medina is meaningless without any allegation whatsoever, outside of a conclusory allegation of counsel, or from Medina of such control and supervision. *Zuckerman v City of New York*, 49 NY2d 557, 562 (mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion). The motion of John's Farms to dismiss the Amended Complaint is granted.

Accordingly, it is hereby

ORDERED, that the Cross-Motion of plaintiff Medina to amend the Amended Complaint (CPLR 3025) to add a cause of action for negligence is granted as to defendant Bi-County Scale & Equipment Co. LLC only and is otherwise denied; plaintiff shall serve a Second Amended Complaint on the remaining defendants Biro and Bi-County within twenty days of entry; and it is further

ORDERED, that the Motion of defendant Biro Manufacturing Company for summary judgment (CPLR 3212) dismissing the Amended Complaint of plaintiff Carlos Medina is granted to the extent of dismissing plaintiff's second cause of action for breach of warranty; the motion by defendant Biro Manufacturing Company for summary judgment (CPLR 3212) dismissing plaintiff's claims for strict products liability and all cross-claims of codefendants is denied; and it is further

ORDERED, that the Cross-Motion of defendant Bi-County Scale & Equipment Co. LLC for summary judgment (CPLR 3212) dismissing the Amended Complaint of Carlos Medina is

granted to the extent of dismissing plaintiff's first cause of action for strict products liability and second cause of action for breach of warranty; the Cross-Motion of Bi-County Scale & Equipment Co. LLC for summary judgment (CPLR 3212) dismissing plaintiff's third cause of action for negligence is denied; and it is further

ORDERED, that the Cross-Motion of defendant and third-party defendant 601 Old Country Road Corporation d/b/a John's Farms for summary judgment (CPLR 3212) dismissing the Amended Complaint of Carlos Medina and all cross-claims asserted against it, as well as the Third-Party Complaint of Biro Manufacturing Company, is granted, and the Amended Complaint (Index No. 158120/2012) and the Third-Party Complaint (Index No. 590292/2013) are both severed and dismissed as against said defendant; and it is further

ORDERED, that defendant Bi-County Scale & Equipment Co. LLC shall serve an Amended Answer to the Second Amended Complaint or otherwise respond thereto within 20 days from the date of service of said Amended Complaint; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: October 13, 2016

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.